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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

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9 LARRY SMITH,

Case No. 3:15-cv-00034-MMD-VPC

10 Petitioner,

ORDER

11 v.

12 JAMES COX, et al.,

13 Respondents.

14 This Court granted respondents' motion to dismiss petitioner Larry Smith's *pro se*
15 28 U.S.C. § 2254 habeas petition in part and concluded that grounds 1(d), 1(e), 3 and 10
16 were unexhausted. (ECF No. 22.) Now before the Court is Smith's motion for stay and
17 abeyance in accordance with *Rhines v. Weber* in order that he may exhaust those
18 grounds (ECF No. 34). Respondents opposed (ECF No. 35) and Smith replied (ECF No.
19 36).

20 In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court placed limitations
21 upon the discretion of the court to facilitate habeas petitioners' return to state court to
22 exhaust claims. The *Rhines* Court stated:

23 [S]tay and abeyance should be available only in limited
24 circumstances. Because granting a stay effectively excuses a petitioner's
25 failure to present his claims first to the state courts, stay and abeyance is
26 only appropriate when the district court determines there was good cause
27 for the petitioner's failure to exhaust his claims first in state court. Moreover,
28 even if a petitioner had good cause for that failure, the district court would
abuse its discretion if it were to grant him a stay when his unexhausted
claims are plainly meritless. *Cf.* 28 U.S.C. § 2254(b)(2) ("An application for
a writ of habeas corpus may be denied on the merits, notwithstanding the
failure of the applicant to exhaust the remedies available in the courts of the
State").

1 *Rhines*, 544 U.S. at 277. The Court went on to state that, “[l]t likely would be an abuse of
2 discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner
3 had good cause for his failure to exhaust, his unexhausted claims are potentially
4 meritorious, and there is no indication that the petitioner engaged in intentionally dilatory
5 litigation tactics.” *Id.* at 278.

6 Thus, this Court may stay a petition containing both exhausted and unexhausted
7 claims if: (1) the habeas petitioner has good cause; (2) the unexhausted claims are
8 potentially meritorious; and (3) petitioner has not engaged in dilatory litigation tactics. *Id.*
9 at 277; *Gonzalez v. Wong*, 667 F.3d 965, 977–80 (9th Cir. 2011). “[G]ood cause turns on
10 whether the petitioner can set forth a reasonable excuse, supported by sufficient
11 evidence, to justify [the failure to exhaust a claim in state court].” *Blake v. Baker*, 745 F.3d
12 977, 982 (9th Cir. 2014). “While a bald assertion cannot amount to a showing of good
13 cause, a reasonable excuse, supported by evidence to justify a petitioner’s failure to
14 exhaust, will.” *Id.* An indication that the standard is not particularly stringent can be found
15 in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), where the Supreme Court stated that: “[a]
16 petitioner’s reasonable confusion about whether a state filing would be timely will
17 ordinarily constitute ‘good cause’ to excuse his failure to exhaust.” *Pace*, 544 U.S. at 416
18 (citing *Rhines*, 544 U.S. at 278). See also *Jackson v. Roe*, 425 F.3d 654, 661-62 (9th Cir.
19 2005) (the application of an “extraordinary circumstances” standard does not comport
20 with the “good cause” standard prescribed by *Rhines*).

21 In its order dated February 26, 2016, this Court granted respondents’ motion to
22 dismiss in part and concluded that several grounds were unexhausted. (ECF No. 22.) In
23 ground 1(d), Smith claims that trial counsel was ineffective for failing to ensure that the
24 district court provided notice of sex offender status prior to sentencing; and in ground 10,
25 Smith contends that his due process rights were violated when the district court failed to
26 provide such notice. (ECF No. 5 at 3, 34.) In ground 1(e), Smith argues that appellate
27 counsel was ineffective for failing to comply with Smith’s demand that counsel withdraw.
28 (*Id.* at 3, 6.) In ground 3, Smith claims that his due process and fair trial rights were

1 violated because Martha Smith's improper vouching for the victim warranted a mistrial.
2 (*Id.* at 12-13.)

3 Smith argues that he can demonstrate good cause for failure to exhaust these
4 claims because he does not understand the procedural process and that documents filed
5 for him by others led him to mistakenly believe that he had fairly presented the claims to
6 the Nevada Supreme Court in his state postconviction petition. (ECF No. 34.) However,
7 a petitioner's claim of confusion about whether a claim was exhausted is not sufficient
8 cause for a stay. *Wooten v. Kirkland*, 540 F.3d 1019 (9th Cir. 2008). This Court concluded
9 that grounds 1(d), 1(e), and 10 were unexhausted because Smith did not raise them in
10 his state postconviction petition. Rather, he raised them for the first time on appeal of the
11 denial of the state postconviction petition, and the Nevada Supreme Court declined to
12 consider the claims because they had not been presented to the state district court. Smith
13 presents no factual allegations to explain why he raised the claims to the Nevada
14 Supreme Court in the first instance. Federal ground 3 is unexhausted because it was
15 raised on direct appeal as a state-law claim only. Moreover, respondents point out that
16 Smith was capable of exhausting the other claims that remain pending in his federal
17 habeas petition. (ECF No. 35 at 5.) Rather than demonstrate that the claims are
18 potentially meritorious, Smith contends that the standard is that "if there is the slightest
19 chance" that petitioner would prevail on the claims that he is entitled to a stay.

20 Smith's argument that his mistaken belief that he had exhausted these grounds is
21 the rationale that the Ninth Circuit rejected in *Wooten*. That court explained that if such
22 belief or impression that claims are exhausted constituted good cause it would render
23 stay-and-abey orders routine. *Wooten*, 540 F.3d at 1024. The court concluded that such
24 result would contravene *Rhines* and undermine the goals of the Anti-Terrorism and
25 Effective Death Penalty Act ("AEDPA") to reduce delays in executing state and federal
26 criminal sentences and to streamline federal habeas proceedings by increasing a
27 petitioner's incentive to exhaust all claims in state court. *Id.*; see also *Rhines*, 544 U.S.

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1 276-277. Smith has failed to demonstrate good cause for a stay and abeyance of these
2 proceedings. His motion will be denied.

3 On May 17, 2017, Smith filed a “courtesy notice of intent to proceed with
4 exhaustion of unexhausted claims” (ECF No. 39) with this Court. He explains that “in order
5 to show due diligence, [he] will submit his supplemental claims in state court between
6 June 1 and June 10, 2017.” *Id.* This Court expressly advises Smith that regardless of
7 whether or how he proceeds in state court, in this federal habeas action, he must, within
8 thirty (30) days, either: (1) inform this Court in a sworn declaration that he wishes to
9 formally and forever abandon the unexhausted grounds for relief in his federal habeas
10 petition and proceed on the exhausted grounds; OR (2) inform this Court in a sworn
11 declaration that he wishes to dismiss this petition without prejudice in order to return to
12 state court to exhaust his unexhausted claims.

13 It is therefore ordered that petitioner’s motion for stay and abeyance (ECF No. 34)
14 is denied.

15 It is further ordered that petitioner will have thirty (30) days to either: (1) inform this
16 Court in a sworn declaration that he wishes to formally and forever abandon the
17 unexhausted grounds for relief in his federal habeas petition and proceed on the
18 exhausted grounds; OR (2) inform this Court in a sworn declaration that he wishes to
19 dismiss this petition without prejudice in order to return to state court to exhaust his
20 unexhausted claims.

21 It is further ordered that if petitioner elects to abandon his unexhausted grounds,
22 respondents will have thirty (30) days from the date petitioner serves his declaration of
23 abandonment in which to file an answer to petitioner’s remaining grounds for relief. The
24 answer must contain all substantive and procedural arguments as to all surviving grounds
25 of the petition, and comply with Rule 5 of the Rules Governing Proceedings in the United
26 States District Courts under 28 U.S.C. §2254.

27 It is further ordered that petitioner will have thirty (30) days following service of
28 respondents’ answer in which to file a reply.

1 It is further ordered that petitioner's two motions for status check (ECF Nos. 37
2 and 38) are both denied as moot.

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4 DATED THIS 2nd day of June 2017.

A handwritten signature in blue ink, appearing to read 'Miranda M. Du', is written over a horizontal line.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE